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No. 02-1167

Supreme Court, U.S.
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In The

Supreme Court of the United States

VIRGINIA VERMICULITE, LLC,

Petitioner,

v.

THE HISTORIC GREEN SPRINGS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

This case involves the donation by W.R. Grace & Co. (Grace) of some land in and adjacent to Green Springs National Historic Landmark (a unit of the National Park Service encompassing about 14,000 acres in Louisa County, near Charlottesville, Virginia) to respondent The Historic Green Springs, Inc. (HGSI), a small, § 501(c)(3) non-profit corporation dedicated to preserving the Landmark. Petitioner/plaintiff Virginia Vermiculite, Ltd. (VVL), which wishes to pit-mine the land for a substance called vermiculite, claims that the donation constitutes a conspiracy in violation of § 1 of the Sherman Act, 15 U.S.C. § 1.[1]

VVL, which lost its claims in both the district court and on appeal to the Fourth Circuit, claims that the court of appeals decision below presents two certiorari-worthy questions, based allegedly on conflicts in the circuits. The first question, according to VVL, is whether an appellate court is barred by F.R.A.P. 28 from considering issues and arguments not raised in an appellee's brief. The second question is allegedly whether "noncompete agreements" are "immune from scrutiny" under Sherman Act § 1, 15 U.S.C. § 1, when imposed "unilaterally."

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[1] HGSI is not aware of any other case in which a plaintiff has argued that a gift of land to a non-profit organization for historic preservation or other conservation purpose violates the Sherman Act.

OVERVIEW

The proceedings below present neither question proposed by VVL.[2] HGSI as well as *amici curiae* National Trust for Historic Preservation and Land Trust Alliance (hereinafter *amici* are jointly referred to as "NTHP") argued that the underlying donations did not constitute an antitrust-relevant conspiracy, as part of HGSI's cross-appeal. HGSI also properly pointed out in the briefing that HGSI/NTHP cross-appeal arguments also constituted "alternative grounds" to uphold the district court.

The second question (alleged immunity from Sherman Act scrutiny) is also not posed by the proceedings below. In 1998, the Fourth Circuit reversed a F.R.C.P. 12(b)(6) dismissal of this lawsuit. This 1998 decision certainly exposed to "scrutiny" the question whether the donation of land by W.R. Grace Company (Grace) to defendant (respondent here) HGSI, subject to restrictive covenants, constituted a conspiracy in violation of Sherman Act §§ 1-2. The parties went through extensive discovery, summary judgment proceedings (HGSI prevailed at summary judgment on Sherman Act § 1), and a trial of the Sherman § 2 conspiracy claim (HGSI won this issue at trial, and VVL never appealed its loss). This hardly constitutes "immunity" from "scrutiny."

The Fourth Circuit's 2002 opinion at issue here does not overturn the decision in 1998 by granting some kind of immunity; it merely determines that, after seven years of litigation, petitioner VVL could not produce any competent

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[2] *See* Sup. Ct. Rule 15.2 (obligation to point out misstatements relating to proceedings below).

evidence indicating that there was an antitrust-relevant conspiracy. More particularly, the Fourth Circuit quite properly ruled that Sherman § 1 is intended to reach activity in which parties pool their "resources, rights or economic power" to achieve a restraint of trade. The court of appeals correctly pointed out that VVL, despite ample opportunity, had failed to present any evidence of any such pooling, or that any market power was either created or enhanced. Therefore there was no antitrust-relevant combination. All that happened was that Grace donated some land to HGSI and got a tax deduction. Gift-giving, the Fourth Circuit observed, is generally understood to be unilateral, even though there is a gift-giver and a recipient, and it would be an "odd result for the mere receipt of a gift to be viewed as proof of concerted action" for purposes of Sherman Act § 1 liability, even when the gift is conditioned by the donor. Pet. App. 11a.

Petitioner VVL suggests to this Court that it simply seeks to apply the Rule of Reason under 15 U.S.C. § 1 to the donation. Under the Rule of Reason, a plaintiff bears the burden of showing a market, market power, or anti-competitive effect.[3] After the Fourth Circuit remand in

[3] Under Sherman Act § 1's Rule of Reason, if there is no market power, then an alleged restraint cannot unreasonably restrain trade (i.e., be anti-competitive). Since market power cannot be measured directly, a plaintiff ordinarily has to show that the defendants encompass a substantial market share of a properly defined antitrust relevant market as a surrogate for a showing of market power. *See* H. Hovenkamp, Federal Antitrust Policy 82 (1994). Thus, to show that a defendant has market power, a plaintiff (here VVL) must first establish an antitrust relevant market (including a product market and a geographic market). *See Murrow Furniture v. Thomasville Furniture*, 889 F.2d 524, 528 (4th Cir. 1989).

1998, the district court below did apply the Rule of Reason. The district court found, on summary judgment, that VVL failed to show any market, market power, or anti-competitive effect, and that it therefore had not sustained its burden of proof under the Rule of Reason as necessary to make out a Sherman § 1 claim.

VVL is the party which wishes to avoid antitrust analysis. VVL characterizes a donation for historic preservation as inherently a conspiracy (because it involves a giver and a recipient) involving a "naked restraint." Based on this characterization, VVL claims that it as plaintiff need not show any market, any market power, any anti-competitive effect, or any causation at all. VVL claims that a historic preservation purpose cannot be pro-competitive, so a donation for that purpose can never be justified for purposes of the application of Sherman § 1. VVL thus effectively claims that all it needs to show to prevail under Sherman § 1 is that a donation is for historic preservation. This is not application of the Rule of Reason; to the contrary, it so "abbreviates" the Rule of Reason as to be tantamount to a new *per se* rule of unlawfulness, wrought without any economic foundation or experience. In short, VVL wants this Court to mandate that lower courts must ignore market realities, forget about "demonstrable economic effect," and instead engage in "formalistic line drawing," precisely the elevations of form over substance that the modern opinions of this Court consistently warn against. *E.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 14, 118 S.Ct. 275, 281 (1997), *quoting Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 58-59, 97 S.Ct. 2549, 2562 (1977).

COUNTERSTATEMENT OF THE CASE

VVL seeks review of action by the court of appeals in affirming a summary judgment entered in favor of HGSI on VVL's Sherman § 1 claims, but VVL's statement of the case is not based on the record found at summary judgment. Instead, VVL draws its Statement of the Case from post-trial findings on VVL's Sherman § 2 conspiracy to monopolize claim. *See* VVL Pet. for Cert. at 1-4, citing 144 F.Supp.2d at 562 and *passim*. VVL's Statement of the Case thus fundamentally distorts and confuses the issues by ignoring the relevant findings and evidence. Compounding this problem, VVL's purported recitation of facts is misleading and incorrect, commencing with its claim that only two firms mine and process vermiculite.[4] Because VVL's purported Statement of the Case is based on the wrong district court decision, and fails properly to present the course of the proceeding, HGSI will briefly summarize the relevant facts and the proceedings below.

The Green Springs National Historic Landmark, a unit of the National Park System, encompasses approximately 14,000 acres of land in Louisa County, Virginia. Two Virginia state agencies (the Department of Historic Resources and Virginia Outdoors Foundation ("VOF")) as well as the U.S. Department of Interior (National Park Service) manage conservation easements covering the bulk of the Landmark. The conservation easements applicable

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[4] For example, from the start VVL disregards imports as well as new entrants (108 F.Supp.2d at 555 n.2 (Pet. App. 124a at n.2)), as well as ample evidence at summary judgment that the relevant product market includes many substitutes for vermiculite. All of these factors are obviously highly relevant in antitrust analysis.

in the National Historic Landmark bar industrial development, including mining, and basically seek to preserve the rural and agricultural character of the Landmark.

Some of the land in the northern portion of the Green Springs National Historic Landmark contains a substance known as vermiculite. Vermiculite has a number of uses (*e.g.*, light-weight filler, insulation, plant mixes, fire protection), but there are a variety of economic substitutes (*e.g.*, perlite and other lightweight aggregates, polystyrene, corncobs, and so on) for each significant use, thus contradicting VVL's position that vermiculite is a relevant antitrust market. In the United States, vermiculite is produced primarily in South Carolina, Montana and Virginia. Vermiculite is also readily available from foreign producers, with major exporters including South Africa, Australia, and China. VVL admitted in the proceedings below that it already controls reserves sufficient to supply it through the year 2013 in Virginia alone.

Prior to designation of the Landmark, W.R. Grace & Co. (Grace) in the early 1970's acquired land in what is now the Landmark for purposes of mining vermiculite. At that time, Grace produced several end products that used vermiculite and operated vermiculite mining operations in Montana and South Carolina as well. In the late 1980's, Grace switched to substitutes (primarily polystyrene) for vermiculite in its end products, and its demand for vermiculite accordingly plummeted. Grace closed its major vermiculite operation in Libby, Montana, and also

regarded its assets in the Green Springs National Historic Landmark in Virginia as surplus.[5]

In 1991, Grace attempted to sell all of its holdings in and adjacent to the Landmark to petitioner VVL. Grace was willing to effect such a sale on non-exclusionary terms. Apparently overestimating its bargaining power, VVL declined to make an offer Grace felt was reasonable. When Grace indicated to VVL that VVL's initial offer was not adequate, VVL attached conditions with the effect of lowering its offer, and then sent a letter terminating negotiations.[6]

Vermiculite is mined by open-pit mining methods. The Department of Interior determined pursuant to the Mining in the Parks Act § 9, 16 U.S.C. § 1908, that such mining is inconsistent with the Green Springs National Historic Landmark. The Secretary of Interior requested Grace to "consider the merits of participating in the existing [conservation] easement program" for the protection of the Landmark.

After VVL broke off negotiations with Grace, Grace in 1992 and 1994 donated the land which it held in or adjacent to the Landmark to HGSI. Prior to making the 1992

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[5] VVL claimed that Grace closed its Libby, Montana operations because the vermiculite ore was contaminated with asbestos. The district court below refused to allow discovery of, or evidence concerning, asbestos contamination of the Green Springs, Virginia vermiculite ore, except in a post-trial pleading HGSI filed responding to a VVL submission. Shortly after settling this case, Grace entered an asbestos-related bankruptcy proceeding.

[6] The district court specifically found after trial that the negotiations failed due to VVL's negotiating strategy. Pet. App. 36a at ¶134.

donation, Grace consulted with VOF concerning a possible historic preservation donation. VOF, through its Executive Director, Tyson Van Auken, recommended that the donation include restrictive covenants which, like conservation easements, barred industrial uses, including mining. At summary judgment, Mr. Van Auken supplied an affidavit indicating that he made his recommendation because he felt such covenants were appropriate in order to ensure a tax deduction and were otherwise consistent with gifts for public interest purposes. Grace accordingly included the restrictive covenants in the 1992 donation. The covenants barred mining, and provided that the real estate "shall be used solely for agricultural and residential purposes." 118 F.Supp.2d at 558 (Pet. App. 132a). Such covenants were not included in the 1994 donation. Grace took tax deductions for the donations.

PROCEEDINGS BELOW

In early 1995, VVL brought this litigation against HGSI and Grace, alleging violations of Sherman § 1 (conspiracy in restraint of trade) and Sherman § 2 (in the case of HGSI, conspiracy to monopolize; in the case of Grace, attempt to monopolize and monopolization, as well as conspiracy). VVL also alleged parallel state antitrust violations, and violation of the Virginia Civil Conspiracy Act, Va. Code §§ 18.2-499 & 500.

1. Initial motions to dismiss. Grace and HGSI moved to dismiss under F.R.C.P. 12(b)(6). Insofar as relevant to HGSI, the district court dismissed the suit on the §§ 1 & 2 conspiracy claims on the ground that the Complaint alleged only matters consistent with a gift for

historic preservation, which the district court viewed as unilateral. The lawsuit continued on the Sherman § 2 monopolization count against Grace. In response to VVL's appeal of the dismissal, the Fourth Circuit reversed the dismissal. Pet. App. 241a (156 F.3d 539 (1998)). The Fourth Circuit reasoned that inferences in a Complaint must be taken in favor of the plaintiff on a motion to dismiss. The Fourth Circuit observed that, per the Complaint, the donation allegedly resulted in a curtailment of vermiculite supplies and an increase in the price of vermiculite, that HGSI allegedly obtained a pecuniary gain from the transaction (in the form of hundreds of acres of land), and that its members allegedly benefitted commercially. 156 F.3d at 541 (Pet. App. 250a-251a). Assuming the allegations as true, and drawing all reasonable inferences in VVL's favor (as required on motions to dismiss), the court of appeals viewed the transaction as "fundamentally commercial," and thus subject to antitrust scrutiny even though a gift. The Fourth Circuit accordingly remanded for further proceedings. 156 F.3d at 540 (Pet. App. 249a).

2. Subsequent motions for summary judgment. Upon remand, and after extensive discovery, including numerous fact and expert depositions, Grace and HGSI again moved for summary judgment on all counts. VVL filed a cross motion for summary judgment on its Sherman § 1 claim, and against certain of HGSI's defenses.

Contemporaneously with the motions for summary judgment, HGSI, joined by Grace, moved to exclude the testimony of VVL's purported expert economist, Seth Schwartz, under this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). HGSI and Grace pointed out that Mr. Schwartz was neither an

economist (he was a geological engineer and business associate of VVL's principal), nor did he employ methodology comporting with economic science. After four days of hearings, including testimony from three economics professors (Drs. Mills and Goetz of the University of Virginia for HGSI, and Dr. Hay of Cornell University for Grace), the district court granted the motion to exclude the Schwartz testimony. 98 F.Supp.2d 729 (W.D. Va. 2000).[7]

VVL never appealed the ruling excluding its proposed economics expert. In consequence, VVL had no experts with which to counter the expert affidavits, expert deposition testimony, or, for that matter, the sworn *Daubert* hearing testimony presented by HGSI and Grace.

The defense economics experts explained that the evidence on which VVL relied did not establish, and was insufficient to establish, the existence either of an antitrust-relevant market, or of any anticompetitive effect in any market. In particular, they indicated that there was no evidence of any price increase due to any supply constraint. Significantly, Dr. Mills also provided testimony that a donation of the sort at issue here diluted rather than enhanced or preserved market power, if any, held by Grace.

In addition, HGSI supplied unrebutted evidence that its members drew no commercial benefit from the donation; that the only "pecuniary gain" to HGSI was the kind involved in all charitable gift giving and receiving; and that such "pecuniary gain" had never heretofore been

[7] VVL fails to include this opinion in its Appendix.

viewed as antitrust-relevant. *Accord, DELTA v. Humane Society*, 50 F.3d 710 (9th Cir. 1995). HGSI renewed its argument that only unilateral conduct was involved, and that the transaction insofar as HGSI was involved was not commercial. In short, HGSI supplied unrebutted evidence showing that each assumption made by the court of appeals in 1998 in favor of VVL on the basis of Complaint allegations was incorrect.

VVL cross-moved for summary judgment on the ground that the traditional Rule of Reason was not applicable. Although VVL conceded that there was no *per se* violation of Sherman § 1, VVL urged that the donation must be presumed anticompetitive under an "abbreviated" Rule of Reason because, VVL claimed, the donation was a "naked restraint" on production, and thus presumptively anticompetitive. VVL urged that the presumption was here irrebuttable because the purpose was historic preservation, which VVL asserted could never be procompetitive.[8]

In response to HGSI's contention that the donation was unilateral and non-commercial, VVL claimed that the Fourth Circuit's 1998 ruling foreclosed this contention. VVL ignored the fact that the Fourth Circuit's 1998 ruling was based on acceptance of Complaint allegations as true, as required for motions to dismiss.

3. Summary judgment on Sherman § 1. In *California Dental Ass'n v. FTC*, 526 U.S. 756, 775 n.12, 119 S.Ct. 1604, 1615 n.12 (1999), this Court indicated that

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[8] *See* 108 F.Supp.2d at 571-74 (Pet. App. at 159a-163a, esp. 162a-163a) (district court summary of VVL contention).

a lower court must determine if the effects of an alleged transaction "actually are anticompetitive" before abjuring traditional Rule of Reason analysis in favor of a truncated "quick look" as advocated by VVL here. The district court below was exceptionally well-informed concerning evidence of anticompetitive effects, for it had held four days of *Daubert* hearings on the economic evidence, and was accordingly well aware that there was no competent evidence of any anticompetitive effects flowing from the donation at issue in this case. The district court accordingly rejected the "quick look" doctrine advocated by VVL. 108 F.Supp.2d at 574-75 (Pet. App. 163a-167a).

Under traditional Rule of Reason analysis, the district court found that VVL simply could not bear its burden of proof to establish an antitrust relevant market, market power, or other anticompetitive effects. 108 F.Supp.2d at 575-85 (Pet. App. 167a-184a). Although the district court ruled that an antitrust economics expert is not always required to establish market, market power or anticompetitive effects, the district court noted that "as a practical matter, . . . the plaintiffs' lack of any witness to testify about antitrust economics or to rebut the defendants' economists, proves fatal." 108 F.Supp.2d at 576 n.16 (Pet. App. 170a n.16). The district court explained, among other things, that defendants HGSI and Grace "discharge[d] their summary judgment burden both by pointing out that there is an absence of evidence to support the plaintiffs' proposed product market definition, and by providing their own unrebutted [expert] evidence that negates the plaintiffs' proposed definition." 108 F.Supp.2d at 577 (Pet. App. 171a). The district court accordingly granted summary judgment against VVL on VVL's Sherman § 1 claims.

VVL appealed its loss under Sherman § 1 to the Court of Appeals for the Fourth Circuit. HGSI cross-appealed several of the district court's rulings, including the district court's ruling at summary judgment against HGSI's affirmative defense that HGSI and Grace had not entered into an agreement covered by the Sherman Act.

The Fourth Circuit, exercising *de novo* review, upheld the summary judgment against VVL, but for reasons different from those employed by the district court. The court of appeals held in essence that VVL had failed to produce sufficient evidence of an agreement as opposed to unilateral conduct to survive summary judgment. 307 F.3d 277 (2002) (Pet. App. 1a). VVL petitions for certiorari from this action.

4. Summary judgment on Sherman § 2 monopolization and attempt. To show a monopolization or, attempt to monopolize under Sherman § 2, a plaintiff must show an antitrust-relevant market and market power or, in the case of attempt, something dangerously close. 108 F.Supp.2d at 584 & 588 (Pet. App. 185a and 192a). As the district court ruled, "[w]ithout an expert economist, the plaintiffs have no evidence that the inferences they draw . . . are economically sound." 108 F.Supp.2d at 585 (Pet. App. 187a). In contrast, the defense experts conducted a cross elasticity analysis and concluded that "[t]he existence of a variety of substitutes in a variety of applications indicates that even a hypothetical monopolist supplier of vermiculite would be unable to profitably increase price." 108 F.Supp.2d at 587 (Pet. App. 190a). Because VVL did not and could not carry its burden, the district court granted summary judgment against VVL on its monopolization and attempt to monopolize claims brought against Grace. VVL never appealed this ruling.

5. Trial on Sherman § 2 conspiracy to monopolize. Over HGSI's objection, the district court held that the plaintiff need *not* show an antitrust relevant market or market power for purposes of the one remaining Sherman Act count: Sherman § 2 conspiracy to monopolize. The district court held (erroneously in HGSI's view) that economic showings are irrelevant to a conspiracy-to-monopolize claim, and that plaintiff VVL needed only to show that HGSI was conspiring with Grace to monopolize "any segment" of commerce. *E.g.*, 108 F.Supp.2d at 588-90 (Pet. App. at 194a-95a).

VVL's Sherman § 2 conspiracy to monopolize claim subsequently went to a bench trial. Because Grace settled on the first day of the trial and was dismissed, HGSI was the sole defendant. After two weeks of testimony, the trial court took the case under advisement, ultimately entering judgment in favor of HGSI and against VVL on the Sherman § 2 conspiracy count, and on all remaining Virginia state law counts. 144 F.Supp.2d 558 (2001). The district court found at trial that VVL failed to prove the required specific intent; i.e., that VVL failed to show that Grace and HGSI intended to monopolize any "appreciable part of interstate commerce." 144 F.Supp.2d at 596 (Pet. App. 89a). The district court also found, in any event, that VVL failed to show that the donation by Grace to HGSI caused any antitrust injury, or injury in fact, to VVL. 144 F.Supp.2d at 597-601 (Pet. App. 90a-97a). VVL did not appeal the judgment against its Sherman § 2 conspiracy claim to the Fourth Circuit.

6. Trial on Virginia Conspiracy Act claims. The district court found, after trial, no Virginia Civil Conspiracy Act liability because there was no causation-in-fact proven. VVL appealed this ruling to the court of appeals.

The court of appeals upheld the district court on the ground that there was no underlying tort on which civil conspiracy liability could be predicated as a matter of Virginia state law. 307 F.3d at 284 (Pet. App. 13a). VVL does not petition for review of this ruling here.

ARGUMENT

I. VVL's Proposed Rule 28 Question Is Not Posed by this Case

VVL's primary question tendered to this Court is whether an appellate court is barred by F.R.A.P. 28 from upholding summary judgment in a civil case on a ground allegedly not raised during appellate briefing. VVL Pet. for Cert. at i (question 1); *id.* 6-19. This issue is not presented in this case.

HGSI argued at summary judgment that VVL failed to show any combination or agreement to which the Sherman Act applied. This argument overlapped HGSI's affirmative defense that the Sherman Act was inapplicable to the transaction in question. VVL moved for summary judgment against HGSI's affirmative defense, claiming that HGSI's defense was foreclosed by the Fourth Circuit's earlier 1998 ruling that the VVL Complaint alleged a transaction which was "fundamentally commercial." The district court sided with VVL on this point, granting summary judgment against HGSI. 108 F.Supp.2d at 603-04 (Pet. App. 225a).

VVL, of course, did not appeal this portion of the district court's ruling. However, HGSI addressed the issue in the Fourth Circuit by cross-appealing the summary judgment against our affirmative defense on this point.

HGSI briefed the issue (as appellee and cross-appellant),[9] as did *amici* NTHP, et al.[10] In candor, HGSI presented many independent arguments which would dispose of the case against VVL, and HGSI's treatment of the conspiracy/affirmative defense issue was accordingly and necessarily brief. VVL responded in its Reply and Answering Brief, chiefly by arguing that HGSI should not be permitted to cross-appeal. VVL Reply at 38.[11] In HGSI's final Reply Brief at 4 (Pet. App. 387a), HGSI explained its cross-appeal was entirely proper, but, in any event, HGSI's cross-appeal arguments "also constitute alternative grounds to uphold the judgment of the District Court in favor of HGSI [and] [j]ustice as well as judicial efficiency require consideration of alternative arguments in this situation." HGSI then elaborated on NTHP's argument

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[9] HGSI Op. Brief at 68-70 (Pet. App. 377a-78a).

[10] NTHP pointed out, among other things, that it was Hornbook law that whether an activity falls within the Sherman Act depends on whether the participants derived an economic benefit from a reduction of competition in the market where the target firms operate. NTHP Br. at 10, citing 1A P. Areeda & H. Hovenkamp, Antitrust Law ¶262 (1997). NTHP argued that at summary judgment HGSI supplied unrebutted evidence that it derived no economic benefit as well as unrebutted expert economics testimony indicating that Grace's donation of land containing vermiculite to HGSI was

> "not the kind of activity that on its face would either 'further' market power or 'obtain' it. Rather, the donation represented a relinquishment of control, not an augmentation of market power over the real estate in question."

NTHP Br. at 11, citing Jt. App. 407 (expert economist affidavit); Jt. App. 1045 (expert report). VVL does not set forth the NTHP brief in its Appendix.

[11] VVL does not include its Reply and Answering Brief in its Appendix.

(*see* note 10) on the point. HGSI Reply at 20-22 (Pet. App. 401a-402a).

Since HGSI and its allied *amici* raised the issue of whether the gift giving involved here was antitrust-relevant, and VVL addressed the matter, VVL's claim that the issue was not raised is, to use the vernacular, just another dog that will not hunt. With apologies for mixing metaphors, one is reminded of the old Wendy's television commercial which asked, "[w]here's the beef?"

Even were the question presented here, the alleged conflict between the circuits VVL tries to conjure out of F.R.A.P. 28 lacks merit. F.R.A.P. 28 merely addresses the form and technical requirements for briefs, and does not purport to state limits on appellate review. *See* 16A C. Wright, et al., Federal Practice and Procedure § 3974, p. 490 (1999). Leading commentators have not found such limits. *E.g.*, *id.* § 3974.2 at pp. 523-25. Additionally, F.R.A.P. 40 (which VVL completely ignores in its Petition) affords any party disgruntled with an opinion by a court of appeals an opportunity to advise the court of appeals through a petition for rehearing of "each point of law or fact that the petitioner believes the court has overlooked or misapprehended." Surely the "second bite at the apple" afforded by Rule 40 serves to remedy, and certainly to reduce to acceptable levels, all those mischievous outcomes VVL seems to feel could arise from hypothetically uninformed jurists penning allegedly misguided opinions on matters which learned but highly partisan appellate counsel claims were unbriefed.

Pursuant to F.R.A.P. 40, VVL filed a petition for rehearing (including a petition for rehearing en banc) below. That petition was unanimously denied by the

Fourth Circuit. Two (Circuit Judges Luttig and Williams) of the three members of the 2002 Panel also sat on the 1998 Panel in this proceeding. In these circumstances, it is clear that the Fourth Circuit was very well-acquainted with the case, and with VVL's contentions. After giving VVL seven years to establish a case, the Fourth Circuit simply agreed with HGSI and the district court that all VVL was able to do was produce allegations, assumptions and formalisms, as opposed to evidence. In sum, this case does not pose an issue, manifest a circuit split, or raise an important federal question about F.R.A.P. 28.

II. VVL's Proposed Sherman Act Question Is Not Posed by this Case

VVL's proposed second question is ostensibly whether a "covenant not to compete" attached to a land or lease transfer is "immune" from Sherman Act "scrutiny" when it is "unilaterally imposed" by the original property owner or lessee. VVL Pet. at i. This question is simply not posed by the proceedings below. As made plain in our explanation of the case, the Fourth Circuit in 1998 reversed a dismissal of this case for discovery and further proceedings on whether there was an antitrust-relevant conspiracy. 156 F.3d 539, Pet. App. 241a. This is the opposite of "immunization" from Sherman Act "scrutiny."

The Fourth Circuit's 2002 opinion does not change this equation. The 2002 decision fully acknowledged that a restrictive covenant – or any gift for that matter – *might* pose a Sherman Act problem. The Fourth Circuit, however, also acknowledged that gifts are commonly understood to be unilateral and in fact are unilateral. Thus, to engender Sherman Act liability, the court of appeals held that at

summary judgment, the plaintiff must show that the alleged gift involves some form of pooling or leveraging of antitrust-relevant economic power, at least when, as here, the defendant produces evidence to the contrary. Here, the defendant (HGSI) not only produced evidence to the contrary, but, as the district court found, the plaintiff failed to show any market impacted by the donation at all. Indeed, plaintiff VVL lacked an expert economist to rebut the unanimous defense expert testimony that the evidence failed to show any market, market power, or anticompetitive effect whatsoever. In short, VVL had utterly failed to show a combination or collusive action which caused any antitrust-relevant effect, and basically could not since it lacked any expert to rebut defense expert testimony to the contrary.

VVL argues that the Fourth Circuit erred in "explicitly reject[ing] the lower court's holding that an antitrust conspiracy was proven by HGSI's agreement to accept the land and lease transfers and be subject to the attached restrictive covenants." VVL Pet. at 20. This mischaracterizes what happened below at two levels. First, VVL is wrong in implying the district court found that VVL had "proven" some kind of liability on the part of HGSI. The district court found no § 1 conspiracy at summary judgment and no § 2 conspiracy at trial. Second, if VVL means instead to imply that the Fourth Circuit erred in rejecting the district court's treatment of whether VVL's proof at summary judgment met the "combination" element of a § 1 offense, then VVL is still wrong. The district court (at VVL's urging) had misread the court of appeals' 1998 opinion on the Rule 12(b)(6) dismissal as having determined, in essence, that *any* gift of land qualified as a "conspiracy" because it involved a giver, a recipient, and a thing of value (land). The court of appeals indicated that

this superficial formalism misread its opinion: the plaintiff still must show that there was some kind of combination of the resources or rights of the two parties which affected the competitive process by the time of summary judgment. *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752, 769, 104 S.Ct. 2731, 2740 (1984), upon which the Fourth Circuit relied below (Pet. App. 8a), stresses that economic reality and common sense must be employed in determining whether an alleged "combination" is in fact unilateral, as opposed to a pooling of economic power. In short, *Copperweld* stands in opposition to the sort of formalistic categorizations VVL advocates here in lieu of proof of a combination which enhances or creates economic power.

The Fourth Circuit was thus not overlooking the district court's determinations; instead, the court of appeals was correcting the district court's misapplication of 12(b)(6) dismissal standards to the summary judgment context. On motions to dismiss under 12(b)(6), allegations, assumptions and counsel's conjectures may trump evidentiary reality because the parties have not had an opportunity for discovery, and weight is placed on what might possibly be shown, rather than what in fact is shown, to be the reality. But at summary judgment, under the plain terms of F.R.C.P. 56(e), evidence trumps allegations, assumptions, and the conjectures of VVL's counsel. All the Fourth Circuit did in its 2002 opinion at issue here is say that by the time of summary judgment proceedings, VVL had to produce some evidence; VVL could no longer rely on the bare allegations of its Complaint and the rhetoric of its lawyers when its opponent HGSI presented unrebutted contrary evidence.

Elsewhere in its *certiorari* petition, VVL argues that the restrictive covenants imposed on the portion of the

donation below made in 1992 are "nakedly unreasonable restraints of trade when not ancillary to any procompetitive purpose," that historic preservation can never be procompetitive, that it can never justify an alleged restraint, and that such "'naked' restraints on output . . . warrant summary condemnation." VVL Pet. at 25. Again, this is another iteration of VVL's demand that this Court create a new *per se* rule banning donations or other transfers of assets for historic preservation. Again, VVL is urging formalistic line drawing over economic reality and evidence. This is simply contrary to this Court's ruling in *State Oil Co. v. Khan*, *supra*, and the entire thrust of modern antitrust jurisprudence.

"Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored." *Eastman Kodak v. Image Tech. Servs.*, 504 U.S. 451, 466-67, 112 S.Ct. 2072, 2082 (1992). The Fourth Circuit has generally ruled that it is inappropriate to apply the "quick look" doctrine to abort a Rule of Reason analysis without a full evidentiary hearing to examine the market realities. *See Continental Airlines v. United Airlines*, 277 F.3d 499 (2002). Here the district court already had an extensive (four days) evidentiary hearing on HGSI's *Daubert* motion to exclude VVL's purported economics expert. The *Daubert* hearing underscored the inappropriateness of "quick look" as sought by VVL here. The Fourth Circuit's opinion below merely reflects the need to go beyond empty formalism to examine, at the summary judgment stage, whether a purported "agreement" involves any pooling of power or rights which has any antitrust-relevance at all.

VVL's attempt to conjure up a split in the circuits as to the result below is nonsense. Application of the "naked

restraint" doctrine, as demanded by VVL, has uniformly been rejected in all similar cases dealing with a vertical non-price restraint, which is what VVL alleges here. *E.g.*, *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594-95 (1st Cir. 1993) (abbreviated Rule of Reason only used for horizontal agreements); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 953 F.Supp. 617, 654-55 & n.8 (E.D. Pa. 1997); *Parikh v. Franklin Med. Ctr.*, 940 F.Supp. 395, 401 (D. Mass. 1996).

VVL argues that donations (or presumably sales or any other transfers of land) for historic preservation are "naked" restraints of trade and must be condemned under Sherman § 1 as inevitably and inherently anticompetitive. In economic terms, preservation of resources for historic, cultural or open space purposes is a form of economic output used and enjoyed by virtually all Americans, as reflected by the numerous private and public parks, historically preserved lands, wildlife preserves, ecologically preserved areas, and similar kinds of outdoor recreational and cultural facilities across our country. Thus, in economic terms, preservation of resources in a National Historic Landmark by an organization such as defendant HGSI constitutes the production of a legitimate economic output that both economic science and the antitrust laws value every bit as much as production of vermiculite. In the proceeding below, HGSI supplied unrebutted expert economics testimony that historic preservation was economically legitimate and donations or other transfers for historic preservation were procompetitive.

VVL's new tact of calling the donation below an agreement not to compete, or a noncompete covenant, is simply more misleading categorization by VVL. As the Fourth Circuit recognized, Grace's conditioned donation

does not close off any competitive ability that HGSI had in the absence of the donation. This is in marked contrast to the traditional use of "noncompete covenant" to refer to agreements that do in fact extinguish the ability of at least one party to compete in some relevant market. Here the covenants in question extinguished no competition because HGSI could not be bargaining away something that it never had. Attached to land that Grace already controlled, these covenants served merely to implement lawful purposes of the donor, including, *inter alia*, historic preservation values and what Grace believed was advisable in order to safeguard its tax deduction. Of course, land thus donated to an historic preservation group does not thereafter compete with other land available to the mining industry. Rather than being *ipso facto* anticompetitive, this result simply indicates that, in the competition between two incompatible and equally legitimate end-uses, the non-mining use has won out. Moreover, even after seven years of trying, VVL produced no competent evidence, much less persuasive evidence, that the donation had any discernible impact at all on the competitive process, prices for vermiculite, vermiculite output, or any antitrust-relevant indicia.

VVL claims that under *United States v. Addyston Pipe*, 85 F. 271, 280 (6th Cir. 1898), noncompete covenants are illegal restraints of trade. VVL Pet. at 21. Even if one assumes *arguendo* that the donation below could be categorized as encompassing a noncompete covenant, VVL's rhetoric goes way too far. First, "noncompete" covenants are certainly not always illegal restraints of trade under *Addyston* or anything else. It has long been recognized that ancillary restraints to legitimate objectives are not illegal under Sherman § 1. *See United States*

v. Addyston Pipe & Steel Co., 85 F. at 282, *aff'd*, 175 U.S. 211, 20 S.Ct. 96 (1899). As this Court has recognized, noncompete covenants in the context of transfers of assets are classic ancillary restraints which merely enhance the value of a contract or permit "the enjoyment of [its] fruits." *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 729 n.3, 108 S.Ct. 1515, 1522 n.3 (1988). *See also Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 224 (D.C. Cir. 1986) (ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose).

Restrictive covenants on land and their legal twin, conservation easements, are ordinary and customary means to preserve land for historic preservation/ environmental purposes. They are a classic example of a restraint ancillary to a legitimate purpose. HGSI verified this conclusion in the proceeding below at summary judgment not only by supplying evidence that the Department of Interior encouraged conservation easements in the very National Historic Landmark at issue in this proceeding, but also by an affidavit by VOF's Tyson Van Auken.

VVL says the court of appeals' decision conflicts with *NYNEX v. Discon*, 525 U.S. 128, 119 S.Ct. 493 (1998), where VVL claims this Court held that an agreement between a buyer and the plaintiff's rival constituted "an antitrust conspiracy subject to rule of reason review." Pet. Cert. at 28. There is no conflict. The *NYNEX* district court dismissed the entire Complaint under Rule 12(b)(6). The Second Circuit reversed on the theory that the Complaint stated a cause of action for a *per se* violation of Sherman § 1, and for similar reasons, a violation of Sherman § 2 conspiracy to monopolize. This Court reversed the Second

Circuit on the § 1 claim, and vacated the § 2 claim. This Court declined to rule on whether the Complaint stated a cause of action otherwise because such matters were "outside the questions presented for certiorari." 525 U.S. at 140.[12]

VVL says the decision below conflicts with *Business Electronics v. Sharp*, 485 U.S. 717, 726-27, 108 S.Ct. 1515, 1520-21 (1988). *Sharp* clearly indicates that this Court favors scrutiny of economic realities as opposed to the expansion of *per se* rules and presumptions of illegality which VVL espouses. This Court at 485 U.S. at 726-27 states that there is a presumption in favor of Rule of Reason analysis, and "any departure from that standard must be justified by demonstrable economic effect." But the district court, over VVL's objection, applied the Rule of Reason analysis below. The district court found that VVL did not, and in the face of unrebutted testimony by defense economics experts, could not bear its burden under the Rule of Reason. The court of appeals merely noted that, in the circumstances, VVL failed to show anything other than a unilateral gift with no consequences on commerce whatsoever. The result below is consistent with, and indeed compelled by, *Business Electronics v. Sharp*.

In *Poller v. CBS*, 368 U.S. 464, 82 S.Ct. 486 (1962), also cited by VVL, this Court read the evidence as to

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[12] *NYNEX*, *supra*, suggests that Sherman § 2 conspiracy to monopolize rises or falls with a tandem § 1 Rule of Reason claim, 525 U.S. at 139. HGSI is aware of no case in which a plaintiff irrevocably lost, as VVL irrevocably has lost here, a Sherman § 2 conspiracy to monopolize claim, but prevailed in a Sherman § 1 restraint of trade claim subject to a Rule of Reason analysis.

whether there was a conspiracy as insufficient to sustain a summary judgment. This Court did not hold that an antitrust conspiracy existed but remanded the case for a jury trial because material facts were disputed. In contrast, the district court below found, after a trial, that VVL had failed to prove any conspiracy in violation of Sherman § 2, and that VVL had failed to prove that the donation caused any antitrust injury or harm in fact. As the court of appeals pointed out, VVL simply presented no evidence of a pooling of assets, rights, or market power that constrained the competitive process.

VVL cites a couple of circuit cases which it alleges conflict with the result below because certain allegations were held to "state" an antitrust conspiracy. VVL Pet. at 28-29. Again, VVL's Complaint allegations were held to "state" an antitrust conspiracy here. That was the point of the Fourth Circuit's first opinion (in 1998) below. VVL simply failed to discharge its subsequent burden to present evidence to back up its allegations. That is the point of the Fourth Circuit's most recent opinion (in 2002). There is no conflict.

The Fourth Circuit determined that the very basis for VVL's case was lacking; that VVL did not even show that the "conspiracy" it alleges had any effect on anything commercial – on anything antitrust-relevant. All that was left was a gift for historic preservation and gifts are traditionally viewed as unilateral. VVL lost at summary judgment on its claims that the donation, even if unilateral, somehow violated the antitrust laws. Indeed, any such claim by VVL was untenable after the district court's unappealed *Daubert* ruling.

VVL may now wish it had offered Grace more money for the land rather than cutting its offer and breaking off negotiations in 1991-92. But VVL's own poor business decisions a decade ago do not somehow transmogrify into an antitrust conspiracy when Grace transfers the property to someone else. In the end, VVL could not show that Grace's donation of its land to someone else, instead of selling that land to VVL, was anything more than a unilateral and legitimate business decision with favorable tax consequences. VVL failed to produce competent evidence that the donation was a bargained-for melding of economic power between two entities of any antitrust-relevance.

CONCLUSION

It is time to bring this costly and chimerical crusade against historic preservation to a close. The questions VVL proposes are not presented, and in any event, VVL shows no conflict with the law in other circuits, or with this Court, nor does VVL show an important federal question. The petition for certiorari should be denied.

Respectfully submitted,

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REPLY

BRIEF

(4)

Supreme Court, U.S.
FILED
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No. 02-1167

In The
Supreme Court of the United States

VIRGINIA VERMICULITE, LLC,

Petitioner,

v.

THE HISTORIC GREEN SPRINGS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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FIRST QUESTION PRESENTED

HGSI does not even attempt to address the pervasive circuit conflict demonstrated in the petition on whether an appellate court can decide an issue that was not raised by a party in appellate briefing. HGSI offers no explanation of how the decisions from the First, Third, Fifth, Seventh, Tenth and Eleventh Circuits finding FRAP 28 mandatory (Pet. 8-11) can possibly be reconciled with the cases in the Second, Fourth, Sixth, Eighth, Ninth, Federal and D.C. Circuits finding it discretionary (Pet. 12-15). Indeed, HGSI fails to cite any case *at all* that supports its position on this issue.

As usual, when the law is against a party, it must pound other things. But that should not distract from the implicit confirmation HGSI's brief provides that there is no persuasive rebuttal to the showing of a circuit conflict. Were there any such rebuttal, HGSI would have provided it. Further, the other things that HGSI pounds to try to distract attention from this legal conflict are clearly devoid of merit.

1. HGSI remarkably asserts that it *did* raise the conspiracy issue in its appellate briefing. Opp. 2, 16-17. What makes this claim remarkable is that the pages it cites confirm precisely the opposite. *See* Opp. 16 n.9 & 17 (citing Pet. App. 377a-378a, 401a-402a). Not a single sentence in those cited pages ever raises any argument that VVL failed to show an antitrust conspiracy. To the contrary, those pages raise only HGSI's claim that its conduct was not "commercial" and was therefore outside the Sherman Act and protected by the First Amendment and National Historic Preservation Act. Pet. App. 377a-378a, 401a-402a. That claim had already been rejected in the first Fourth Circuit decision, 156 F.3d at 540-42 & n.2, and in any event was not the ground relied upon by the second Fourth Circuit decision from which review is sought here.

Rather, the latter decision relied solely on the new ground that no antitrust conspiracy existed as a matter of law, and the plain fact is that HGSI never raised such an argument and thus VVL never knew to brief a response to it. Thus, HGSI's citation confirms that the Fourth Circuit decided an issue that was not briefed on appeal.

2. HGSI then contends that its allied amicus raised the conspiracy issue in its amicus brief. Opp. 2, 16. Again, this claim is remarkable because the cited pages show precisely the opposite, that the amicus instead argued HGSI's conduct was financially disinterested and thus within noncommercial conduct and First Amendment exemptions to the Sherman Act. Opp. 16 n.10 (citing amicus brief at 10-11). Since HGSI failed to provide an appendix containing this allegedly relevant briefing, we do so here. *See* Reply App. 1a-3a.

The cited amicus briefing does not contain a single sentence purporting to raise a claim that VVL failed to establish the conspiracy element. *Id.* To the contrary, the lead paragraph of this cited section of the amicus brief makes clear that it is raising only the same noncommercial conduct and First Amendment defenses raised by HGSI. *Id.* Indeed, it makes clear that even HGSI's amicus shared the understanding that this was HGSI's claim on appeal rather than some argument that no conspiracy existed.

Further, HGSI cites no authority for the proposition that an appellate court can decide an issue that was not raised by any party if it was raised by an amicus brief. This proposition conflicts with FRAP 28, which requires that issues and arguments be raised by *the parties* rather than by their amici. Here, HGSI was not only an appellee but filed as a cross-appellant on issues decided adverse to

it. It thus had to conform to the rules applicable to appellants. FRAP 28(a) requires that the "appellant's brief must contain . . . a statement of the issues presented for review" and "appellant's contentions and the reasons for them." It does not state these requirements can be fulfilled by an amicus. Even if HGSI were deemed an appellee for purposes of this rule, FRAP 28(b) requires that "appellee's brief must conform" to those same requirements except that the appellee can dispense with offering a statement of the issues if it is satisfied with the appellant's statement. Here, HGSI did offer its own statement of issues, and it nowhere raised a conspiracy issue. Pet. App. 323a-324a. Even if (contrary to fact) the amicus had raised the conspiracy issue, that cannot cure HGSI's failure to do so.

3. In addition, the underlying factual assertion by HGSI and its allied amicus – that its activities were not commercial because HGSI gained no pecuniary advantage from the transaction – was flatly contradicted by the factual findings of the district court. The district court found:

> Grace documents show that the value of the donated land itself, independent of the mining rights, was $721,000. "[B]y receiving hundreds of acres of land, HGSI . . . realized a substantial 'pecuniary gain,'. . . . " *Id.* The evidence also is undisputed that HGSI sold some of the donated parcels for pecuniary gain. This is sufficient to show the transaction was commercial in nature.

Pet. App. 225a-226a.

Relatedly, and contrary to this Court's rules, HGSI makes many other factual assertions in its "Counterstatement of the Case" without citing to any support in the record at all. Opp. 5-8. Despite HGSI's assertions that it is an innocent nonprofit pursuing purely preservationist goals, Opp. 10-11, what the trial court found based on a detailed record was that HGSI's conduct not only reaped it

pecuniary gains, but was designed to help Grace further its anticompetitive objectives rather than further any preservationist objective held by Grace or HGSI. Pet. 4 (collecting quotes from trial court findings). This is why the HGSI-Grace agreement barred vermiculite mining even on land that could be successfully restored or lay outside the preservation district, and why the agreement was changed to allow any commercial mining other than the vermiculite mining that competed with Grace. *Id.* at 3-4. Although HGSI made the same misrepresentations to the district court that it makes to this Court, this district court stated:

> In its review of the record, the court also has uncovered evidence suggesting – contrary to representations heretofore made by HGSI – that HGSI intends to mine the [donated] Louisa County properties.

Pet. App. 156a. The district court likewise found at trial that HGSI wanted to put some donated property to "commercial/industrial use." Pet. 4.

4. HGSI next miscites a treatise for two propositions that it plainly does not state. HGSI first falsely asserts that the treatise states that FRAP 28 "does not purport to state limits on appellate review." Opp. 17 (citing Wright, et al., Federal Practice and Procedure §3974, p. 490 (1999)). Nothing on that cited treatise page makes any such statement. To the contrary, the treatise goes on to state that "issues that are not raised in the appellant's initial brief . . . will normally not be considered by the court," collecting four pages of decisions so holding. Wright, *supra*, §3974.1, at 501. To be sure, the treatise also notes that "courts will sometimes be quite liberal in passing on issues that arguably were not properly raised," collecting the set of decisions from other circuits so holding. *Id.* at 501-04.

But this merely confirms, not refutes, the existence of the circuit conflict that should be resolved by certiorari review.

HGSI second miscites this treatise for the proposition that "[l]eading commentators have not found any such limits" on appellate review of issues not raised in appellate briefing. Opp. 17 (citing Wright, *supra*, §3974.2, at 523-25). But again nothing on the cited pages supports HGSI's assertion. To the contrary, what the treatise there states is that the appellee's brief must conform to the same requirement's as the appellant's brief, with the exception noted above that an appellee need not include a statement of issues unless it is dissatisfied with appellant's statement of issues. Wright, *supra*, §3974.2, at 523-25. But this exception has no relevance here since HGSI was a cross-appellant, was dissatisfied enough to offer its own statement of issues, and neither HGSI's nor VVL's statement of issues raised any conspiracy issue. Pet. App. 261a, 323a-324a. Nor would this exception excuse HGSI's failure to raise the issue in its argument section.[1]

5. Finally, HGSI argues that FRAP 40's allowance of a petition for rehearing somehow trumps FRAP 28's requirement that issues be raised in appellate briefing. Opp. 17-18. Tellingly, HGSI cannot muster a single authority to support this misguided proposition. And this proposition plainly conflicts with the decisions from the First, Third, Fifth, Seventh, Tenth and Eleventh Circuits finding that FRAP 28 precludes consideration of issues not raised in appellate briefing. Pet. 8-11.

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[1] An appellant must raise an issue both in its statement of issues *and* argument section. FRAP 28(a); Wright, *supra*, §3974.1, at 508. Thus, even where (unlike here) FRAP 28(b) does excuse an appellee from offering a statement of issues, it bars consideration of issues an appellee fails to raise in its argument section.

Nor is the availability of a petition for rehearing relevant as a matter of law or policy. As a legal matter, FRAP 28 imposes a clear mandatory obligation on parties to an appeal to raise any issues they wish an appellate court to consider, and a party is thus entitled not to have an issue adjudicated against it that the opposing party never briefed. Nothing in FRAP 28 suggests its obligations are trumped by FRAP 40. Nor does FRAP 40 anywhere suggest that it overrules FRAP 28. It is a standard canon of construction to read provisions to give them both meaning, not to assume one renders the other meaningless.

As a policy matter, the petition for rehearing is not an adequate substitute for briefing before an appellate decision. The reasons are several. First, a heavy legal presumption operates against a party raising issues through a petition for rehearing. *See, e.g.*, Fourth Circuit Rule 40(a) ("Although petitions for rehearing are filed in a great many cases, few are granted.") Parties are entitled to have issues adjudicated on a level playing field, without the burden of that heavy adverse presumption, and to make that right meaningful they must have an opportunity to brief the issues at a stage where no such adverse presumption applies. Second, even without that legal presumption, petitions for rehearing are inadequate because they come after the fact. The court will have already committed itself (without briefing) to a contrary position, and it is a universal feature of human psychology that it is harder to convince humans of a proposition that requires them to admit they were wrong. Finally, petitions for rehearing are severely limited in length. Indeed, here the petition for rehearing specifically noted that, because of those limits, the conspiracy issue could "only be sketched in the limited space allowed here." *See* Petition for Rehearing at 9. The Fourth Circuit has thus never had adequate briefing of the conspiracy issue, and has indeed only seen a small fraction

of the briefing of that issue that this Court has seen on this petition for certiorari.

In any event, the availability of a petition for rehearing does nothing to rebut the demonstration of a pervasive circuit conflict on how to interpret FRAP 28's requirement that issues be raised in the initial appellate briefing. Accordingly, even if the availability of a petition for rehearing were relevant, its relevance would go only to how this Court should resolve the question presented, not to whether certiorari should be granted.

SECOND QUESTION PRESENTED

HGSI does not offer any rebuttal to the detailed showing made in the petition about why the Fourth Circuit decision on the conspiracy issue conflicts with numerous decisions by this and other Courts. *See* Pet. 21-30. Instead, HGSI tries to evade this issue by repeatedly confusing two distinct antitrust matters: (1) whether a conspiracy exists that triggers substantive review under Sherman Act §1; and (2) whether that substantive review was properly conducted. This petition presents only the first issue. The second issue is not presented, and could not be presented since the Fourth Circuit never ruled on it.

1. HGSI's main argument is that VVL's Sherman Act §1 fails because abbreviated rule of reason review is inappropriate and VVL failed to prove the market power or anticompetitive effects required by full scale rule of reason review. Opp. 18-25. HGSI is wrong on both counts, and if the Court is interested in the reasons why, it is invited to read Pet. App. 282a-313a. But the fact is that those issues are irrelevant at present because the Fourth Circuit never reached the substantive question whether the restraint was unreasonable because it found no

conspiracy. *See* 307 F.3d at 280 ("we do not reach the detailed rule of reason analysis the district court undertook"). Thus, although the substantive reasonableness of the restraint *was* fully briefed to the Fourth Circuit, it was not resolved by that court, and thus could not have been – and was not – raised in the certiorari petition. That issue is accordingly not before this Court. If this Court takes certiorari and holds that a conspiracy existed, then the Fourth Circuit can on remand consider HGSI's arguments that its restraint survives a substantive inquiry into its reasonableness.

2. HGSI's other similarly confused argument is that the Fourth Circuit holding that no conspiracy existed does not immunize the restraint from substantive scrutiny under Sherman Act §1 because *the district court* conducted such a substantive inquiry. Opp. 2-4, 18. This argument ignores the fact that VVL is entitled to – but did not get – *appellate* review of how the district court conducted that substantive inquiry into the reasonableness of the restraint. The Fourth Circuit decision thus did immunize the challenged restraint from that substantive inquiry on appeal. It also held that the district court did not have to reach that substantive inquiry, and that district courts in all future cases involving restrictive covenants imposed on transfers of assets should not engage in any substantive inquiry into reasonableness but should simply hold that no conspiracy exists.

3. HGSI falsely asserts that VVL's argument is that covenants not to compete are "always illegal restraints of trade under *Addyston*." Opp. 23. In fact, the petition repeatedly states precisely the opposite, that noncompete covenants attached to the transfer of assets are agreements that are illegal only if unreasonable. Pet. 22-25. Petitioner's objection is instead that the Fourth Circuit decision made

all such noncompete covenants *legal* per se by deeming them nonagreements.

4. HGSI falsely asserts without any record support that: "The district court found no §1 conspiracy at summary judgment and no §2 conspiracy at trial." Opp. 19. This is an astonishing misstatement since it is so explicitly contradicted by the record. At summary judgment, the district court held: "The plaintiffs produced sufficient evidence to establish the existence of a contract, combination, or conspiracy to restrain trade in violation of § 1 of the Sherman Act." Pet. App. 157a. At trial, the district court held: "The court finds that Grace's and HGSI's actions were not consistent with independent action, and that VVL proved by a preponderance of the evidence that HGSI and Grace acted in concert toward a common goal." *Id.* 80a. What the district court held was that, although a conspiracy was proven, the Sherman Act claims survived substantive review.

5. Finally, HGSI repeatedly asserts that VVL simply failed to present evidence of a conspiracy. Opp. 2-3, 20, 26. Again, this factual assertion by HGSI is plainly contradicted by the record. The district court cited copious amounts of evidence proving a conspiracy under all traditional standards. *See* Pet. App. 76a-80a, 144a-49a, 153a-57a. What this case involves is the Fourth Circuit's imposition of a new legal standard about the *sort* of evidence required to prove a conspiracy.

That new standard requires not only the traditional proof that separate entities acted in concert, but also additional proof (where a restrictive covenant is attached to a transfer of assets) that the receiving party added some resources or market power that was necessary to establish the covenant. Pet. 20-21. In particular, under this standard the Fourth Circuit held irrelevant evidence that

HGSI agreed to accept the assets, abide by the covenants, and pay carrying costs to get the assets. *Id.* To the Fourth Circuit, none of that evidence rebutted its conclusion that imposing a restrictive covenant is a unilateral exercise of the property rights of the transferor of property. *Id.* HGSI offers no rebuttal to VVL's showing that this new legal standard could *never* be met for any restrictive covenant imposed on a transfer of property or business assets, and that the Fourth Circuit decision thus conflicts with numerous precedent by this and other courts. *Id.* 21-30.

CONCLUSION

The petition for writ of certiorari should be granted on both questions presented. Indeed, the conspiracy question is so clear-cut after extensive briefing on this petition by both sides that the Court should consider reversing summarily on that question. *See Palmer v. BRG*, 496 U.S. 934 (1990) (summarily reversing antitrust decision based on the petition briefing where antitrust error of lower court clear). In the alternative, this Court should at least grant, vacate and remand for an explanation of why the Fourth Circuit decided the conspiracy issue without any briefing at all.

Respectfully submitted,

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Counsel of Record

Counsel for Petitioner

April 7, 2003

CITED EXCERPTS FROM NTHP AMICUS BRIEF PAGES 9-11

In addition to setting forth the entirety of the cited pages 10-11, the following sets forth page 9 of the amicus brief because it provides the introductory context:

II. HGSI's CROSS-APPEAL SHOULD BE GRANTED.

The District Court granted summary judgment dismissing HGSI's defense that it was a social action organization attempting to preserve a National Historic Landmark District. In particular, the court rejected HGSI's non-commercial conduct and First Amendment defenses. 108 F. Supp. 2d at 603-604. In the view of *amici*, the District Court's approach was overboard on this issue, exposing a wide range of legitimate social and political activities to unwarranted attack as violations of the Sherman Act.

Although antitrust laws can apply to nonprofit organizations, the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. at 213 n.7. As a corollary, the Supreme Court has made clear that conduct is not rendered "commercial" merely because it has an effect on competition. Although noncommercial activity often has some impact on the competitive marketplace, the Sherman Act was not intended "to serve as comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade." *Allen Bradley Co. v. Local Union No. 3*, 325 U.S.

797, 806 (1945); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140-141 (1961), (court declined to "permit" an extension of the Sherman Act . . . simply because those activities have a commercial impact.); *see also Dedication and Everlasting Love to Animals v. Humane Society*, 50 F.3d 710, 714 (9th Cir. 1995) ("Not every aspect of life in the United States is to be reduced to . . . a single-minded vision of the ubiquity of commerce."); *accord, National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612, 620 (7th Cir. 1992) ("Congress [in the Sherman Act] did not intend to reach every activity that might affect business."). Whether in the context of political activity, as in *Noerr*, or other noncommercial conduct, it is difficult to envision activities that do not have at least arguable commercial effects.

The proper test for whether defendants' activity falls within the scope of the Sherman Act is whether "the antitrust defendants are likely to receive direct economic benefit *as a result of any reduction in competition in the market in which the target firm or firms operate.*" 1A Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 262 (1997) (emphasis added); *accord, Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 427 (1990) (Act applicable if the defendants "stand to profit financially from a lessening of competition" due to the activity in question). At summary judgment, HGSI supplied unrebutted evidence that its officers and members received no compensation, and employed proceeds of donations to preserve the National Historic Landmark in accordance with an agreement with the federal government. As a result, HGSI members and officers received no pecuniary gain

personal to themselves as opposed to the public at large from the activity in question. In other words, HGSI did not obtain or seek "an economic advantage . . . special to [itself]." *Id.* at 426.

As the court found at summary judgment, there was no evidence of any anticompetitive effect or any market power in relevant market. The district court indicated that VVL was unable to satisfy burden of proof in this respect, given the unanimous defense expert testimony to the contrary. *Virginia Vermiculite, Ltd.*, 108 F. Supp. 2d at 578.

HGSI also supplied unrebutted expert evidence that Grace acted without "an economic advantage . . . special to [itself]." *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 493 U.S. at 426. The donation of real estate involved here was not the kind of activity that on its face would either "further" market power or "obtain" it. Rather, the donation represented a relinquishment of control, not an augmentation of market power over the real estate in question. In short, the. . . .